

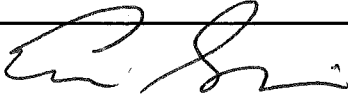
Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

SUBJECT: SEE BELOW

DATE: 06-11-09

Approved 

Date 6/12/09

COUNCIL DISTRICT: Citywide

**SUBJECT: HAPPY HOLLOW PARK & ZOO – ZOO AND ATTRACTIONS
SUBSTITUTION OF SUBCONTRACTOR**

REASON FOR SUPPLEMENTAL

West Bay Builders, Inc., the general contractor on the Happy Hollow Park & Zoo – Zoo and Attractions project, and Green Growth Industries, Inc, the listed subcontractor for the landscape, irrigation and green roof work, presented the City with a full explanation along with supporting documentation of their respective positions with regard to the substitution of subcontractor issues.

RECOMMENDATION

Consent to the request of West Bay Builders, the general contractor on the Happy Hollow Park & Zoo – Zoo and Attractions project, to substitute Jenson Corporation for Green Growth Industries, Inc., the listed subcontractor for the landscaping, irrigation and green roof work.

OUTCOME

Approval of West Bay Builders' ("WBB") substitution request will enable the proper substitution of Jenson Corporation for Green Growth Industries ("GGI") and allow for the completion of the landscape, irrigation and green roof work in a timely manner.

BACKGROUND

In its bid, WBB listed GGI as the subcontractor that would perform the landscape, irrigation and green roof work. This work is a significant part of the project.

On May 5, 2009, Public Works received a request from WBB for substitution of the listed subcontractor GGI. (See Attachment A.) The basis of the request was that GGI has refused to procure a bond and to enter into a written contract with language requiring the bond. The request stated that it was made pursuant to California Public Contract Code Sections 4107(a)(1)(3)(4)

and 4108(a) and (b). On May 8, 2009, Public Works received a letter from GGI objecting to the substitution request. (See Attachment B.)

Before the substitution request, GGI performed approximately \$76,800 of work on the project. GGI performed this work without having a signed contract with WBB.

Public Works requested each party to present the City with a full written explanation, along with all supporting documentation, of their respective positions with regard to the above issues and any rebuttal to the other party's position. On May 14, 2009, WBB submitted a full explanation to staff for the request for substitution of subcontractor (Attachment C). On May 22, 2009, GGI submitted a full explanation to staff of its objections to the substitution request (Attachment D). On May 26, 2009, WBB submitted a rebuttal (Attachment E).

ANALYSIS

A. Requirements For Approving Substitution Request.

Pursuant to Section 2-1.15B of the City of San José Standard Specifications, WBB is prohibited from substituting another subcontractor for GGI unless the City first consents to such substitution for one of the reasons specified in that Section. Section 2-1.15B is consistent with the State's Subcontractor Listing Laws. These requirements are intended to protect subcontractors from general contractors engaging in bid shopping.

In the letter WBB provided in support of its substitution request, WBB asserts it is requesting substitution pursuant to California Public Contract Code Section 4107(a)(1), which is similar in material respects to Section 2-1.15B.1(a) of the City's Standard Specification. To prevail under this provision, WBB must demonstrate both of the following:

1. That WBB presented GGI with a written contract based upon the general terms, conditions, plans and specifications for the Happy Hollow Park & Zoo – Zoo and Attractions (HHPZ) project or the terms of GGI's written bid; and
2. That GGI failed and/or refused to execute the written agreement after being given a reasonable opportunity to do so.

In its letter, WBB also asserts that the request for substitution should be granted pursuant to California Public Contract Code Section 4107(a)(4), which is similar in material respects to Section 2-1.15B.1.c of the City's Standard Specifications. To prevail under this provision, WBB must demonstrate that GGI has failed to meet the applicable bond requirements.

B. Consent To The Substitution Request Is Appropriate Based On GGI Failure To Execute The Subcontractor Agreement Sent By WBB.

On or about December 7, 2007, WBB sent GGI its standard subcontract. In the cover letter, WBB requested that GGI not make any changes to the standard subcontract without first discussing the change with WBB. The documents submitted by WBB indicate that it sent a revised standard subcontract to GGI on or about May 12, 2008. It is unclear what revisions were made to the subcontract. During April, 2009 – following a number of requests by WBB – GGI returned an executed copy of the standard subcontract. GGI made three changes to the standard subcontract that WBB claims are unacceptable and justify its substitution request. The three changes that WBB focuses on involve bonding, insurance and payment. Staff agrees that one of the changes to the payment provision justifies the substitution request.

1. Bonds

The standard contract that WBB sent to GGI contained a provision requiring GGI to provide a performance bond. GGI struck out this provision. This appears to be problematic for WBB because its bonding company is requiring that five (5) of WBB's "large valued" subcontractors - of which GGI is one - provide bonds. At least part of the delay in the execution of the subcontract appears to be related to this issue. Nonetheless, WBB's argument that GGI's elimination of the bond provision justifies its request for substitution is misplaced.

As discussed above, pursuant to Section 2-1.15B.1(a) of the City's Standard Specifications, WBB must provide GGI with a subcontract that is consistent with the terms of GGI's written bid. GGI's written bid very clearly states that it excludes "Permits/Bonds." Despite this exclusion, WBB elected to list GGI as its subcontractor. By doing so, it effectively agreed to abide by the terms and conditions of GGI's written bid proposal – including the exclusion of bonds. Thus, GGI was justified in striking out the performance bond requirement.

Moreover, as discussed further below, to require GGI to provide a performance bond WBB must have informed GGI of the requirement before bid opening. There is nothing in the documents provided by WBB to indicate that WBB did this. To the contrary, the "invitation to bid" sent by WBB to GGI contained no reference to bonds. The first reference to the bonding requirement appears to have been in the standard subcontract that WBB sent to GGI on December 7, 2007, which would have been approximately four (4) months after the opening of the bids for the project. In its letter objecting to the request for substitution, GGI states:

When you requested a bond from us on this project I informed you that we were reluctant to tie up our bonding capacity on subcontract work, knowing that we need this capacity for prime projects we are pursuing. I also did not agree with this request considering our proven history with West Bay and the fact that there was no communication of bonding being a requirement at bid time. . . . [¶] . . . West Bay Builders as the prime contractor is required to specify bond requirements prior to bid time pursuant to section 4108 of the public contract code. If we had been notified of this requirement for bonding as a subcontractor this would have

given us the opportunity to weigh out our options of whether or not to bid on this project at that time.

In short, staff concludes that the striking of the bond requirement from the subcontract agreement does not provide a basis for consenting to the substitution.

2. Insurance

WBB also complains that GGI altered critical insurance requirements on the standard subcontract and that this justifies the request for substitution. However, a review of GGI's changes indicates otherwise.

Section 8 of the subcontract is entitled "Insurance." The opening paragraphs of that section clearly provide that GGI "shall carry Comprehensive General Liability *or* Commercial General Liability insurance. . . ." (Emphasis added.) Section 8.A. sets forth the insurance limits for each alternative. Section 8.A.1 sets forth the insurance limits under the Comprehensive General Liability insurance option; Section 8.A.2 sets forth the insurance limits under the Commercial General Liability insurance option.

GGI struck the insurance limits under the Comprehensive General Liability insurance option (Section 8.A.1) and wrote "N/A" next to them. In the Commercial General Liability insurance option (Section 8.A.2), GGI wrote "G.GI will furnish the following Insurance." GGI wrote this after the phrase "[i]f SUBCONTRACTOR carries Commercial General Liability insurance, the limits of liability shall not be less than:" and before the specification of the insurance limits.

WBB argues that GGI never specified what insurance amounts it would provide. However, when fairly read in context, it seems reasonably clear that GGI's alterations were intended to convey that GGI would provide Commercial General Liability insurance at the limits set forth in the subcontract. Thus, WBB gave GGI two options for providing insurance, and the changes to the subcontract made by GGI simply indicate which option GGI will comply. For this reason, staff concludes that these changes by GGI do not provide a basis for consenting to WBB's substitution request.

3. Compensation

Finally, WBB argues that changes made by GGI to the compensation provision justify the request for substitution. Although WBB's argument is not overwhelming, staff concludes that it provides a sufficient basis for the City to consent to the substitution.

GGI added the following sentence before the Payment Schedule provision contained in Section 4 of the subcontract:

Progress payments to be every 30 days not to exceed 45 days and final retention due once G.G.I. final inspection passes.

Each of the subcontracts provided by the parties also contain some lines through the printed language, some initials and the comments “Not Acceptable,” “This is not OK,” and “No.” However, it is unclear whether these other markings were made by GGI or were made by WBB in response to the changes made by GGI. The letters submitted by GGI and WBB regarding the request for substitution do not shed any light on this issue.

However, WBB’s May 14, 2009 letter in support of its request for substitution characterizes GGI’s alterations to the subcontract as changing the payment schedule to require “payment every 30 days regardless of the City’s withholds to West Bay. . .” and as modifying “the terms to require payment in full, including retention, upon ‘final inspection’ of GGI’s work.” In its May 22, 2009 letter objecting to the substitution request, GGI does not contest WBB’s characterization of the changes made by GGI to the subcontract. Rather, GGI asserts that “WBB addresses minor issues (such as the payment schedule). . . .”

For purposes of resolving this matter, staff accepts the uncontested characterization of the changes made by GGI to the payment schedule. Contrary to GGI’s assertion, the payment terms and conditions at issue are material provisions of the agreement and cannot fairly be characterized as minor issues. GGI’s bid proposal to WBB did not contain any reference to the terms and conditions of payment, and there is no indication that the terms and conditions of payment were ever discussed before WBB accepted GGI’s bid proposal. Accordingly, the terms and conditions of payment involve an area of the subcontract in which the parties are free to differ. WBB was within its right not to accept the changes to the payment schedule proposed by GGI.

Based upon the changes to the payment schedule, staff concludes that GGI failed or refused to execute the written contract that was presented to it. Staff also concludes that GGI was given a reasonable opportunity to execute the written subcontract given that it had the subcontract for almost 16 months before returning it to WBB. Accordingly, on this ground alone, staff recommends consenting to WBB’s request for substitution. .

C. GGI’s Failure To Provide A Performance Bond Does Not Provide A Basis For Consenting To WBB’s Substitution Request.

In its May 14, 2009 letter to the City, WBB also argues that its substitution request is justified pursuant to California Public Contract Code Section 4107(a)(4). Public Contract Code Section 4107(a)(4) is similar to Section 2-1.15B.1.(d) of the City of San José Standard Specifications. Both of these provisions allow the substitution of a subcontractor based on the subcontractor’s failure to provide bond. However, the general contractor must have notified the subcontractor of the bonding requirement before the opening of bids. That did not occur in this case.

The facts – as reflected by the documents submitted by the parties – demonstrate that the first notification WBB gave to GGI of the bond requirements was in the standard subcontract provided to GGI on December 7, 2007. This was approximately four (4) months *after* the bid opening. The bid solicitation sent by WBB to GGI on July 20, 2007 did not mention the bond

D. GGI's Argument That It Has Performed Work Does Not Provide A Basis For Rejecting The Request For Substitution.

GGI argues the WBB's request for substitution should be rejected because it has already performed work on the project without a contract. It appears from the documents provided that GGI has performed approximately \$76,800 worth of work out of a proposed total contract amount of \$1,571,637.

GGI provides no authority for its argument that it elected to provide work out of contract provides a basis for rejecting WBB's request for substitution. As discussed above, the parties have not entered into an agreement because of a dispute of the payment schedule – which constitute a material term of the agreement. Although GGI has an argument that it is entitled to compensation for the work performed, this does not change the fact that the parties have been unable to agree to the material terms and conditions of the subcontract agreement. Accordingly, staff recommends rejecting GGI's argument based on it having performed work.

CONCLUSION

Based on the lack of agreement between WBB and GGI over the payment schedule provision, staff recommends consenting to the substitution of Jenson Corporation for GGI.

EVALUATION AND FOLLOW-UP

The Happy Hollow Park & Zoo – Zoo and Attractions project is approximately eighty percent (80%) complete with project beneficial occupancy scheduled for summer 2009.

PUBLIC OUTREACH/INTEREST

- ☐ **Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- ☐ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ☐ **Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This item does not meet any of the Criteria above. This memorandum will be posted on the City's website for the June 16, 2009 Council agenda.

HONORABLE MAYOR AND CITY COUNCIL

06-11-09

Subject: Happy Hollow Park & Zoo Substitution of Subcontractor – Supplemental Memo

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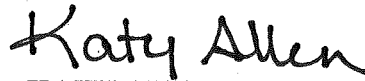
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COORDINATION

This project and memorandum have been coordinated with the Department of Planning Building and Code Enforcement and the City Attorney's Office.

CEQA

CEQA: Not a project.



KATY ALLEN

Director, Public Works Department

For questions please contact DAVID SYKES, ASSISTANT DIRECTOR, at (408) 535-8300.

Attachment

KJ:gr